IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 951 OF 2005

Mrs. Sudesh J. Mathur ...Appellant

Versus

M/s. Kuber Traders & Ors ...Respondents

.....

Mr. S.V. Marwadi i/b Smt. Shobha Salvi, Advocate for Appellant

Mr. Samir Vaidya, Adv. for Respondent No.1.

Mr. S.R. Shinde, A.P.P. for State.

.....

CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 6TH OCTOBER, 2005

P. C.:-

1. Heard the learned advocate for the appellant i.e. original complainant in C.C. No.870/S/1999, heard the learned advocate for the respondent Nos. 1 and 2 i.e. original accused and the learned A.P.P. for the State. The said complaint was filed in the Court of Metropolitan Magistrate, 9th Court, Bandra Mumbai by the appellant for an offence under Section 138 r.w. 142 of Negotiable Instruments Act.

2. By order dated 29.5.2004, the learned Magistrate dismissed the complaint as the complainant was absent.

3. Being aggrieved by the said order, the appellant preferred revision before the Sessions Court for setting aside the order of the Magistrate restoring the complaint. The learned Sessions Judge by order dated 27.7.2004 dismissed the revision application. Being aggrieved by the said order dated 27.7.2004 passed by the learned Sessions Judge, this appeal has been preferred.

4. The Supreme Court in the case of **Mohammad Azeem Vs. A. Vankatesh and Anr. [2003 ALL MR (Cri) 400 (SC)]** has held that if the complaint has been dismissed for non appearance of the complainant, the complaint ought to be restored on file on sufficient cause being shown. Mr. Vaidya has submitted that in the case of Mohammed Azeem, the complainant had remained absent only on a single date and hence, the complaint came to be restored. However, in the present case, the complainant remained absent on four occasions and in such circumstances, the learned Magistrate has rightly dismissed the complaint.

5. In the present case, the complainant is a lady. Her husband had been transferred to Pune, hence, she could not attend the Court on the said four dates. It is stated by Mr. Marwadi that is the reason for the complainant being absent. On the part of the

respondents this statement has not been denied. Even though Section 256 of Cr.P.C. provides that the complaint can be dismissed if the complainant does not appear, a bare perusal of the said Section clearly shows that it is not the only option available to the Magistrate if the complainant is absent. The latter part of Section 256 of Cr.P.C. clearly indicates that "the Magistrate has another option i.e. to adjourn the hearing of the case to some other date. The third option which is available to the Magistrate under this Section is that, the Magistrate may proceed with the case if in the opinion of the Magistrate, the personal appearance of the complainant is not necessary. The reasons for absence of the complainant can be numerous. Sometimes the reasons may be beyond the control of the complainant. If the complainant’s presence is not required on that particular day, the Magistrate may dispense with the attendance of the complainant and proceed with the case. In the present case it is seen that on the day that the complaint was dismissed, the matter was not specifically kept for recording the evidence of the complainant or for cross-examination of any witness by the complainant.

6. Reading Section 256 of Cr.P.C. in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section.

The first is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with the attendance of the complainant and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.

7. Reliance was placed by the learned advocate for the respondent on the decision of the Single Judge of this Court in the case of **M/s. Lloyds Finance Ltd. Vs. M/s. SKG Solvex Ltd. & Ors (2002 Cr.L.J.**

2764). In the said case, the order of the trial Court dismissing the complaint on account of absence of the complainant was upheld by this Court. In the said case, it appears that even prior to 16.6.1999, the complainant was absent. Thereafter, he was absent on 16.9.99, 5.11.99, 26.4.2000, 9.8.2000, 17.1.2001, 1.6.2001 and on 24.10.2001. Moreover, in the said case, the accused was not served, hence, it was observed by the Court that the complainant did not take appropriate steps to serve the accused and prosecute the case. In this view of the matter, the Court came to the conclusion that the conduct of the complainant was totally negligent and, hence, the order of the Magistrate dismissing the complaint does not deserve any interference. The facts in the said case and in the case at hand are quite different. In the present case, the complainant was absent on only four occasions. The reasoning put forward by the complainant for remaining absent has not been denied on behalf of the respondent. Moreover, it is seen that the accused himself has consistently remained absent for a number of years. On perusal of Roznama, it is seen that from 29.9.2000 accused has remained consistently absent. In the present case it is seen that the accused himself has not appeared from 29.9.2000. Hence, the present case cannot be equated with the case of Lloyds Finance (supra).

8. Thereafter, reliance was placed by the learned advocate for the respondent on the decision of the Single Judge of this Court in the case of **Aseem Shabanali Merchand Vs. Brij Mehra & Anr (2004 Cr.L.J. 1268).** The learned advocate for the respondents has pointed out that in the said case the complainant was absent on four occasions just as in the present case and in the said case leave was refused and appeal came to be dismissed. However, it is observed that in the said case, no reason at all was given on behalf of the complainant for remaining absent. Whereas in the present case, the specific reason for the complainant remaining absent has been given which has not been controverted by the respondents. Looking to this fact and the fact that the accused has been consistently absent for a number of years, I am of the opinion that the facts in both the cases are different and hence, the ratio of the said case cannot be made applicable to the present case.

9. In the present case, it is an admitted fact that the complainant was absent on four occasions. The reason given by the complainant is that on these occasions, she remained absent on account of her husband being transferred to Pune. This fact is not disputed by the respondent. Their case is only that the complainant was absent on four occasions and

hence, the complaint deserved to be dismissed. It is true that the complainant was absent on four occasions but looking to the fact that it was on account of above fact which fact has not been disputed by the respondent, I am of the opinion that in the interest of justice, the complaint deserves to be restored.

10. Looking to the facts of this case and in the interest of justice the complaint No.870/S/1999 dismissed by the Metropolitan Magistrate, 9th Court, Bandra Mumbai, is restored to file. Appeal is accordingly allowed.

11. At this stage, the learned advocate for the respondents prays that this order may be stayed for a period of eight weeks from today as he wishes to challenge it before the Supreme Court. The said request is reasonable, hence, this order is stayed for a period of eight weeks from today.

*****